

STATE OF MICHIGAN
IN THE SUPREME COURT

JEFFREY SOTELO, SUSAN SOTELO,
WALTER J. VANDER WALL, individually
and as Trustee and PHYLLIS A.
VANDER WALL, individually and as
Trustee,

Supreme Court No. 123430

Plaintiffs/Appellees,

Court of Appeals
No. 238690

-VS-

TOWNSHIP OF GRANT,
Case

Newaygo Circuit Court

No. 00-18133-AW-M

Defendant/Appellant.

123430
S-RH

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PLAINTIFFS' SUPPLEMENTAL BRIEF IN OPPOSITION TO THE
TOWNSHIP OF GRANT'S APPLICATION FOR LEAVE TO APPEAL

FILED

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CORBIN R. DAVIS
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STATEMENT OF BASIS OF JURISDICTION AND GROUNDS FOR APPEAL

Appellees submit this Supplemental Brief pursuant to this Court's Order, dated January 29, 2004. Appellees rely on their previous statement of basis of jurisdiction and grounds for appeal as stated in the original Brief Opposing Application for Leave to Appeal.

COUNTER-STATEMENT OF FACTS

Appellees rely on the Statement of Facts as contained in their original Brief in Opposition to Application for Leave to Appeal.

ARGUMENT

The Court has invited the parties to file supplemental briefs pursuant to its Order scheduling oral argument on the question of whether or not to grant the Township of Grant's application for leave to appeal. The Plaintiffs submit that leave to appeal should be denied because the issues that the Township of Grant has presented for review are only appropriate for consideration by the Michigan Legislature. The Township of Grant, as well as amicus Michigan Department of Consumer & Industry Services, believe that the Land Division Act (the "LDA") should be interpreted in a manner that it believes is most appropriate, yet fail to cite to any legislative history or any compelling authority to support their belief. As the Court of Appeals correctly found, the sections of the LDA relied upon by the Township are not even applicable to this case, and the LDA makes it clear that the property transfer involved in this case is exempt from review by the Township.

Even more important, this statutory exemption was first created (and thus explicitly authorized despite OAG #5929) by the Legislature in a 1990 amendment to the Subdivision Control Act, and retained in the passing of the Land Division Act in 1997. It is this legislative history that dooms the Township's argument. To the extent that the Township has an issue it believes needs to be changed, its sole remedy lies in the form of a petition to the Legislature. As the history of property divisions in Michigan will show, the laws pertaining to land division have often been something less than a "model of clarity", and the Legislature has attempted to do its constitutional duty by clarifying or amending the law as needed. Yet the Township now seeks to impinge on the power of the Legislature by asking this Court to undo and rewrite what the Legislature has already sanctioned.

A. A BRIEF HISTORY OF LAND DIVISION LAWS IN MICHIGAN.

Before Michigan was even a State, the Territorial Law 816 of 1821 required a town proprietor to file a plat map of the proposed town before lots could be sold. It was not until the Plat Act of 1929 was passed that land division rights were once again thoroughly addressed by the Legislature. The Plat Act had a definition of "subdivide" that applied only to the division of property into 5 or more lots, and contained an exception for lots of 10 acres or more used for agricultural purposes. Realizing this method was unworkable and contained an incentive to avoid the Plat Act, the Subdivision Control Act was passed in 1967 by the Legislature. The Subdivision Control Act defined "subdivide" in a manner so that the act was applicable where the division created 5 or more parcels of land each less than 10 acres, all within a 10-year period. Thus, the Subdivision Control Act encouraged divisions that included parcels greater than 10 acres, and created many long, narrow lots, since there were no depth-to-width ratios in place at the time. This plan also proved to be undesirable and not in the best interests of land preservation.

B. THE SUBDIVISION CONTROL ACT IS AMENDED TO PERMIT, WITHOUT REVIEW, THE TRANSFER OF PROPERTY BETWEEN TWO OR MORE ADJACENT PARCELS

1990 P.A. No. 560 amended the definition of "subdivision" to exclude from the definition of property transfers any transfer between two or more adjacent parcels, if the property taken from one parcel is added to an adjacent parcel. Why was this done? Apparently, this provision was done at the request of approximately 300 resort property owners in Bay County who formed a trust to buy a six-mile long, 100' wide strip of abandoned railway property, planning to transfer it in small portions to the adjoining resort owners. These individuals simply desired to avoid the time and expense of the actual platting process and

1990 P.A. No. 560 was thus born. See House Legislative Analysis, HB 5474 (May 14, 1990). As will be seen, this explicit exemption lives on in the Land Division Act. Importantly to this case, the modification was not an oversight, but was a conscious effort by the Legislature to remove transactions between adjoining properties from scrutiny under the then Subdivision Control Act.

C. THE LAND DIVISION ACT RETAINS THE EXEMPTION FOR THE TRANSFER OF LAND FROM ONE PARCEL TO A CONTIGUOUS PARCEL.

The Land Division Act (“the LDA”), effective March 31, 1997, replaced the Subdivision Control Act. The LDA created three types of land divisions – “subdivisions”, “divisions” and “exempt splits”. However, one of the most common types of transactions, which was exempted under the amendment to the Subdivision Control Act, involves the transfer of land from one parcel to another contiguous parcel. This type of transaction was sanctioned by the LDA, which expressly excluded it from the definition of “subdivision”, as well as from the definitions of “exempt splits” and “divisions”. As can be seen, the LDA specifies that land can be transferred from one parcel to an adjoining parcel without implicating the LDA at all:

“(d) “Division means the partitioning or splitting of a parcel or tract of land by the proprietor thereof or by his or her heirs, executors, administrators, legal representatives, successors, or assigns for the purpose of sale, or lease of more than 1 year, or of building development that results in 1 or more parcels of less than 40 acres or the equivalent and that satisfies the requirements of sections 108 and 109. **Division does not include a property transfer between 2 or more adjacent parcels, if the property taken from 1 parcel is added to an adjacent parcel;** and any resulting parcel shall not be considered a building site unless the parcel conforms to the requirements of this act or the requirements of an applicable local ordinance.” (emphasis added)

MCL 560.102 (d)

“(f) “Subdivide” or “subdivision” means the partitioning or splitting of a parcel or tract of land by the proprietor thereof or by his or her heirs, executors, administrators, legal representatives, successors, or assigns for the purpose of sale, or lease of more than 1 year or of building development that results in 1 or more parcels of less than 40 acres or the equivalent, and that is not exempted from the platting requirements of this act by sections 108 and 109. **“Subdivide” or “subdivision” does not include a property transfer between 2 or more adjacent parcels, if the property taken from 1 parcel is added to an adjacent parcel;** and any resulting parcel shall not be considered a building site unless the parcel conforms to the requirements of this act or the requirements of an applicable local ordinance.” (emphasis added)

MCL 560.102(f).

As a result, transfers of land from one parcel to an adjacent parcel, by definition, escape LDA review, since the applicable definitions in MCL 560.102 specifically exclude a property transfer between two or more adjacent parcels. Thus, the transfer does not need to be approved by the municipality, or go through the platting process.

As explained in Plaintiff’s initial brief, that is precisely what happened in this case. The land transferred from one parcel to an adjacent parcel is not counted towards the allowable number of land divisions, since the transfer is simply a non-event under the LDA. Since it is not a “division”, it does not need to undergo the local review and approval process the Township desperately desires before the land transfer can occur. The transaction is simply self-realizing, and so long as the remaining parcel or parcels comply with the local zoning ordinance, the local government has no reason to get involved. In fact, the only restriction on the transfer is that no resulting parcel may be considered a building site unless it conforms to the requirements of the LDA or the requirements of any applicable local ordinance. MCL 560.102(d)(r).

It is important to note that the Legislature imposed only one qualifying factor on a “resulting parcel” when property is transferred from one parcel to an adjoining parcel. The Sotelo parcel is such a “resulting parcel”. The only restriction on the resulting parcel was “... any resulting parcel shall not be considered a building site unless the parcel conforms to the requirements of this Act or the requirements of an applicable local ordinance.” MCL 560, 102 (d). The Legislature did not say that it shall not be dividable or subdividable. It only said that it shall not be considered a building site. Likewise, it did not say that the resulting parcel would have any restrictions with respect to its dividability or subdividability. The parties agreed, and a Court Order was issued in this matter which established that the transfer from Filut to Sotelo was not a division of the Filut property and was legal. That decision is law of this case, has not been appealed, and is also accurate under the LDA. Thereafter, that property became part of the Sotelo property.

As the Court of Appeals pointed out, it cannot read into the LDA prohibitions on the alienation of property which are not clearly supported by the language of the LDA itself. The existing statutory language clearly states that the split of the Sotelo parcel was not a “division” and not subject to platting requirements. As the Court of Appeals recognized, the only way to reconcile the existing language of the LDA is to find that it allows for the development of a parcel created by a transfer between adjacent properties so long as the LDA and local ordinances are satisfied. Whether read “strictly” or by its “plain language”, the LDA does not provide any basis for the Township’s claims.

The Township simply believes that the conveyance of property in this case implicated the LDA, when the clear language of the LDA specifically excludes such a conveyance. This exemption was even found in the Subdivision Control Act, as a result of

an amendment passed a few short years before the LDA. The Township's position is essentially one of misplaced reliance on MCLA 560.109(2); which does not restrict transfer of division rights.¹ This subsection does not address the acquisition of land -- only the affirmative act of transfer of division rights from one parcel to another. Likewise, MCL 560.108(5) has no applicability to the facts of this case by definition since it makes reference to two classes of property: (1) a parcel or tract created by an exempt split, or (2) a division. The Court of Appeals correctly realized this distinction and found Section 108(5) "to be wholly inapposite to this case" (Slip. Op. p. 4) since neither class of property refers to a transfer between properties. It is therefore clear that the rationale employed by the Trial Court is not justified by the LDA, since the transaction is explicitly excluded from the definitions of the LDA. The Legislature could hardly have been more clear with the changes it has made in the Subdivision Control Act, and the LDA, since the issuance of OAG 5929. As such, the Court of Appeals correctly applied the explicit definitions from the LDA in ruling that Section 108(5) did not apply to this case.

¹ MCL 560.109 (2) provides: "The right to make divisions exempt from the platting requirements of this act under section 108 and this section can be transferred, but only from a parent parcel or parent tract to a parcel created from that parent parcel or parent tract. A proprietor transferring the right to make a division pursuant to this subsection shall within 45 days give written notice of the transfer to the assessor of the city or township where the property is located on the form prescribed by the state tax commission under section 27a of the general property tax act, 1893 PA 206, MCL 211.27a. The state tax commission shall revise the form to include substantially the following questions in the mandatory information portion of the form:

(a) "Did the parent parcel or parent tract have any unallocated divisions under the land division act, 1967 PA 288, MCL 560.101 to 560.293? If so, how many?"

(b) "Were any unallocated divisions transferred to the newly created parcel? If so, how many?"

MCLA 560.109(2)(a)(b)

D. OAG 5929 IS OF NO RELEVANCE DUE TO THE SUBSEQUENT AMENDMENT TO THE STATUTE.

1990 P.A. 560 is yet another reason why OAG 5929 (June 25, 1981) is of no value to this case. Prior to the amendment in 1990, Section 102 of the Subdivision Control Act of 1967 clearly covered all divisions -- even if the property was transferred to an adjacent parcel. Thus, OAG 5929 correctly concluded -- at that time - that a parcel, transferred to an adjacent parcel, was in fact a split. In 1990, the Subdivision Control Act was amended. The following language was added to Section 102(d) of the Subdivision Control Act:

“Subdividing or “subdivision” does not include a property transfer between two or more adjacent parcels, if the property taken from one parcel is added to an adjacent parcel; ...”

This change took care of the inconsistencies which the Attorney General pointed out existed in the old Subdivision Control Act. Since the opinion was rendered in 1981, and the Subdivision Control Act was amended to include a definition for "division" that "does not include a property transfer between 2 or more adjacent parcels", OAG 5929 is of no value, especially since this amendment was carried over to the LDA. MCL 560.102(d)(f).

As argued in Plaintiffs' initial brief, this is a case that is much simpler than the Township makes it appear to be -- and one where the Court of Appeals properly recognized the limits of the explicit language found in the definitions of the LDA. It is clear that there is no language in the LDA prohibiting the Sotelo divisions. As a consequence, the Court of Appeals correctly found that the Sotelo's requested divisions are legal, and should have been approved by the Township from the beginning. When the appropriate deference is given to the Legislature, and the standards of legislative interpretation are followed, the only conclusion that can be reached is that this matter is best left to the Legislature.

If the Legislature believes that property transfers between adjoining properties affects land division rights, the Legislature must so state. The Legislature's silence since the amendment to the Subdivision Control Act, which addressed the concerns raised by OAG 5929, speaks volumes and indicates that the LDA is simply not implicated in such a property transaction.

In essence, the Township wants this Court to act as a legislative body and correct what it perceives as imperfections in the LDA. Those are policy discussions which the Court of Appeals properly left untouched, and to which this Court should not apply itself or attempt to legislate. Indeed the very Attorney General's Opinion on which the Township relies (OAG 5929), pointed out the inconsistent or illogical aspects of the original Subdivision Control Act. In the second to last paragraph of its Opinion, the Attorney General suggested that the Legislature amend the Act to arrive at a more logical result. The Legislature did eventually act and liberalized the Subdivision Control Act to remove transfers between parcels from being in any way controlled. Quite simply, the Legislature acted in a manner that was the complete opposite of that now advocated by the Township. Obviously the Legislature could have amended the Subdivision Control Act in a manner consistent with the OAG and the Township, but the relevant fact is that it did not. As such, the Township's Complaint lies with the Legislature, not the Michigan Supreme Court.

E. THE POSITION OF THE ATTORNEY GENERAL

The Attorney General has filed an *amicus* brief urging the granting of leave. Unfortunately, the Attorney General's position is based on a complete misunderstanding of the facts in this case. Therefore, its legal conclusions are meaningless. The Attorney General apparently believes that the southerly parcel, which it identifies as the "Filut" parcel,

was entitled to four divisions, and the parcel identified as to "Sotelo" parcel, was entitled to only two divisions under the LDA - - "[t]hus the limit on the total number of splits allowed for the two parcels was six." Attorney General *Amicus* Brief, page 5. The AG is correct in regards to the Filut parcel. However, the Sotelo parcel is also entitled to four divisions under the LDA. Therefore, the total number of available to the two parcels is eight (not six) under the LDA. The Attorney General then states a conclusion, which contradicts the Opinion of Grant Township and is fatal to Grant Township's position:

"Here, Filut could have given up one or more divisions to the Sotelos by a transfer, thereby increasing the number of splits available to the Sotelos, but decreasing the number of splits available to Filut." Attorney General *Amicus* Brief, page 5.

Contrary to the Attorney General's belief, however, Sotelo did not need more splits, since he was entitled to four under the LDA. MCL 560.108(2)(a).²

F. THE COURT SHOULD NOT GRANT LEAVE

The Court of Appeals' decision in this case was clearly in accordance with the LDA. While the Court of Appeals was correct in determining that the LDA was in derogation of common law and needed to be strictly construed, the Court of Appeals was also correct in determining that there simply was no language in the LDA which supported the Township's position. While admitting that the LDA is not clear, the Township nevertheless wants a Court to start imposing more restrictions on the land owner than what the Legislature authorized. That is simply wrong for any court to do. There is no purpose which will serve either the

² The Attorney General is apparently confused by the Township's argument that, because of the size of the parcel and local zoning ordinances, Sotelos could have utilized only two of the available four splits on their parcel as originally configured, because additional splits would have yielded parcels which were smaller than demanded by Township zoning ordinances. The zoning ordinance is a "use" issue and not an LDA issue. The Sotelos merely acquired additional property and added it to their parcel so that they could utilize the four divisions legal available under the LDA while still complying with the minimum size requirements of the Township. The newly created Sotelo parcel becomes a "resulting parcel" under the LDA. All subsequent divisions are also "resulting parcels" and all meet all of the requirements of the LDA and local zoning ordinances.

parties or Michigan jurisprudence by granting leave to this case - - unless it is for the purpose of making it clear that local governmental units cannot resort to the courts in an effort to legislate a result. It is clear that Grant Township does not like the current situation with the LDA. There are other townships which agree and would like the LDA "cleaned up". However, the competing interests presented to the Legislature make it unlikely that the Legislature will tamper with the LDA and considers the LDA to be a "hot potato". However, the inability of one group to convince the Legislature of the merits of its ideas are not an appropriate reason for this Court to grant leave. This Court has long recognized the importance of the separate roles that the Legislature and the courts have, and that it is an inappropriate court function to fix a problem properly addressed by the Legislature - - unless that legislative action conflicts with a constitutional mandate.

Current Township's Motion for Leave is such an end-run. This Court ought to avoid granting leave unless it is for the sole purpose of making it clear that local units of government may not resort to the courts to obtain a legislative remedy - - no matter how feeble they believe the underlying legislation to be.

"Regardless of how unjust the statutory penalty might seem to this Court, it is not our place to create an equitable remedy for a hardship created by an unambiguous, validly enacted, legislative decree." *Stokes v. Millen Roofing Co.*, 466 Mich 660 at 672, 649 NW2d 371, 2002.

"Moreover, it is not the province of this Court to make policy judgments or to protect against anomalous results. See *Nawrocki*, *supra* at 171, n.27, 615N.W.2d 702". *Hanson v. Board of County Road Com'rs of County of Mecosta*, 465 Mich 492 at 502, 638 N.W.2d 396, 2002.

Importantly, there is no "unjustness" involved here. The Legislature has enacted a reasoned approach. That the Township believes the Legislature could have done better is immaterial.

Grant Township has not preserved any constitutional issues, nor has it even preserved any zoning issues. If Grant Township is correct, it needs to present its issues to the Legislature. Should it be able to convince the Legislature of their position, the Legislature can act - - it may take nine years as it did in correcting the inconsistencies pointed out in the 1981 Attorney General's Opinion, but even the Attorney General in 1981 recognized that the appropriate action was one of legislative action and not court action.

RELIEF REQUESTED

As mentioned earlier, this case is much easier than the Township would lead this Court to believe. Indeed, in a four-page opinion, the Court of Appeals unanimously and correctly ruled that the Trial Court inappropriately placed reliance on the outdated OAG 5929. The Court of Appeals rendered this opinion based upon a clear reading of the plain language of the LDA, especially as aided by the strict interpretation of the statute in favor of the property owner, which compelled that the Trial Court's Opinion and Judgment be reversed. As such, the Court of Appeals correctly held that the Township should have immediately granted the three divisions requested by Sotelo. Therefore, Plaintiffs respectfully request that this Court deny the Township's Application for Leave to Appeal.

Dated: 2/26/04

Respectfully submitted,

VISSER & BOLHOUSE, P.C.

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STATE OF MICHIGAN
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PROOF OF SERVICE

On the date below, the undersigned, employed in the offices of Visser & Bolhouse, sent by first-class mail a copy of the Plaintiffs' Supplemental Brief In Opposition to the Township of Grant's Application for Leave to Appeal to:

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I declare that the statements above are true to the best of my information, knowledge and belief.

Date: February 26, 2004


Constance L. Boukamp

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February 26, 2004

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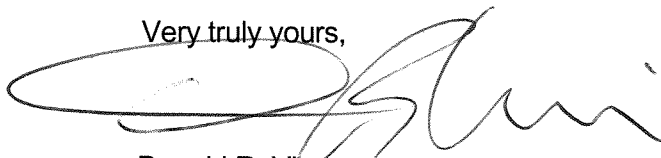
**Re: Jeffrey Sotelo, Susan Sotelo, Walter J. VanderWall,
Individually and as Trustee and Phyllis A. VanderWall,
Individually and as Trustee v Township of Grant
Supreme Court No. 123430
Court of Appeals No. 238690
Newaygo Circuit Court No. 00-18133-AW-M
Our File No. 00-534**

Dear Clerk:

Enclosed for filing, please find an original and eight copies of a Supplemental Brief filed on behalf of Plaintiffs/Appellees, along with an original and one copy of a Proof of Service.

Thank you for your cooperation in this matter.

Very truly yours,



Donald R. Visser

DRV/clb

Enclosures

